87-354

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE STATE OF ARIZONA,

Petitioner,

vs.

RONALD WILLIAM ROBERSON,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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QUESTION PRESENTED FOR REVIEW

IS THE RULE OF EDWARDS V. ARIZONA THAT POLICE OFFICERS MAY NOT INITIATE INTERROGATION OF AN IN-CUSTODY SUSPECT APPLICABLE TO A CASE WHERE THE SUSPECT, HAVING INVOKED HIS RIGHTS IN REGARD TO A CRIME THEN UNDER INVESTIGATION, LATER CONSENTS TO QUESTIONING ABOUT AN UNRELATED CRIME, CONDUCTED BY OTHER OFFICERS WHO ARE IGNORANT OF THE PRIOR INVOCATION OF RIGHTS AND WHO COMPLY COMPLETELY WITH THE REQUIREMENTS OF MIRANDA V. ARIZONA?

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After a suppression hearing the trial court ruled that the police had obtained statements from Roberson in violation of State v. Routhier, 137 Ariz. 90, 669 P.2d 68 (1983), so the statements could not be used by the prosecution during its case-in-chief. Routhier purports to apply Edwards v. Arizona, 451 U.S. 477 (1981). The State appealed this ruling to Division Two of the Arizona Court of Appeals, but the State's claims were rejected in an unpublished Memorandum Decision, State v. Roberson, 2 CA-CR 4474-5 (Ariz.Ct.App., Mar. 19, 1987). The State then petitioned for review by the Arizona Supreme Court, but such review was denied by order on June 30, 1987. The Memorandum Decision and the order are reproduced in the Appendix.

JURISDICTION OF THIS COURT

The action of the Supreme Court of Arizona denying review of the proceedings

below occurred on June 30, 1987 and was reflected in a written notice dated July 1,1987. No rehearing was requested. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 20.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V.

No person ... shall be compelled in any criminal case to be a witness against himself ... .

AMENDMENT VI.

In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This litigation actually involves two wholly separate criminal cases. The present one, Pima County No. CR-16041, concerned a charge that Roberson burglarized a home on April 15, 1985, and stole certain property belonging to Kenneth Baarson. (Record on Appeal, hereafter referred to as R.O.A., at 1.) That same day, April 15, Detective Jerry Cota-Robles of the Burglary Division of the Tucson Police Department received information from a witness to that burglary, describing both a suspect and his vehicle, including a Montana license number. (R.T. of April 3, 1986, at 3-7, 15-16.) On April 18, he called the Major Offenders Unit of the Tucson Police Department to alert them about the suspect vehicle. (Id. at 7-8.) The person with whom he spoke, Det. Barbara Wright, recognized the vehicle description and told Cota-Robles that a subject had recently been arrested in that car for doing another burglary. (Id. at 8-9, 17.)

Cota-Robles therefore contacted the case

officers on the case in which the arrest had been made, Detectives Quinn and Thorson, and arranged to go out with them to question the arrestee, Ronald Roberson, on April 19. (Id. at 9-10.) Cota-Robles was unaware whether Roberson had been questioned before, and no one mentioned any assertion of rights having occurred. (Id. at 10-11, 18.) At the jail Cota-Robles informed Roberson of his rights and Roberson indicated understanding of them, so the detective turned on the tape recorder, advised Roberson of his rights once more, and proceeded with Det. Quinn to question him about the April 15 burglary. (Id. at 10-15, 18-20.) Roberson never said anything about wanting an attorney. (Id. at 19.) The resulting taped statement amounted to a full confession of the April 15 burglary.

The wrinkle develops in this seemingly routine case because of a problem in the other case, CR-15268. It seems that when Roberson was arrested on April 16, he was warned of his rights by an officer named

Perez, and stated that he wanted an attorney; however, when he was approached a few minutes later by a different officer (Garrison), who didn't know of the invocation to Perez, Roberson agreed to talk, and gave statements to Garrison, Quinn, and Wright. (R.O.A. at 106-07; R.T. of April 3, 1986, at 23-27, 40-41.) Those statements were suppressed in CR-15268, to the extent that they could be used only in cross-examination, not in the state's case-in-chief. (R.O.A. at 107; R.T. of April 3, 1986, at 27.) The defense in the present case requested that Roberson's statements given on April 19 be similarly suppressed, on the basis of Edwards v. Arizona and State v. Routhier, supra. (R.O.A. at 106-09.)

The defense agreed that the various officers other than Perez would all testify that they were unaware of Roberson's invocation of the right to counsel made to Perez at the time of arrest on April 16. (R.T. of April 3, 1986, at 52.) The trial

court also found as a matter of fact that there was no connection at all between the April 16 violation and the April 19 questioning. (Id. at 50-51.) Nonetheless, the trial court felt itself bound by Routhier to grant the motion to suppress, to the extent that the confession could not be used in the state's case-in-chief. (Id. at 43-46.) The prosecutor therefore was permitted to dismiss the case without prejudice in order to appeal the suppression motion. (Id. at 60-61.)

The Court of Appeals affirmed the suppression order. It noted that no Fifth Amendment decision by this Court had addressed the issue of interrogation initiated by the police about a second, unrelated, case after invocation of the right to counsel had occurred in the original case, and since it did not believe that this Court's recent Sixth Amendment decisions had any application, it followed the Routhier rule that such questioning is a violation of Edwards. The State petitioned

the Arizona Supreme Court for review on the basis that the Routhier rule was an unjustified expansion of Edwards which contradicted a variety of this Court's more recent decisions, but the petition was denied. Thus, the Court is presented with a federal issue which has been litigated at every stage of the proceedings below (though the handling of it by the Arizona appellate courts was inappropriately perfunctory), so the question is properly before it.

REASONS FOR GRANTING CERTIORARI

A. The Routhier/Roberson rule is not required by Edwards v. Arizona, and Arizona's use of Routhier places it in conflict with the interpretations of Edwards followed in a number of other states.

The Arizona Court of Appeals upheld the granting of the suppression motion in this case on the basis of the Arizona Supreme Court's decision in State v. Routhier, 137 Ariz. 90, 669 P.2d 68 (1983). Routhier, which bans any police-initiated interrogation of an arrestee who has invoked his right to counsel, even if that interrogation is wholly unrelated

to the charge on which the person invoked his rights, purports to be nothing more than an application of Edwards v. Arizona, 451 U.S. 477 (1981). However, Routhier plainly goes far beyond Edwards. Edwards involved a reinterrogation about the same crime as to which the defendant had invoked counsel; to extend it to preclude questioning about wholly unrelated offenses is to take it beyond both its logic and its facts. In the past this Court has cautioned against expanding "currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries...." Lego v. Twomey, 404 U.S. 477, 488-89 (1972). That, however, is precisely what the Routhier/Roberson rule does -- expand the Edwards exclusionary rule into an area not clearly contemplated by that decision.

Judge Learned Hand warned that, "The suppression of truth is a grievous necessity at best, more especially when as here its inquiry concerns the public interest; it can

be justified at all only when the opposed private interest is supreme." McMann v. Securities and Exchange Commission, 87 F.2d 377, 378 (2d Cir. 1937), cert. denied, 301 U.S. 684. That there is such a "supreme" interest in precluding voluntary confessions because of an invocation of rights in a wholly separate investigation is far from self-evident. Indeed, the appellate courts in a number of jurisdictions have concluded (many of them post-Routhier) that Edwards does not bar questioning about unrelated offenses. See Lofton v. State, 471 So.2d 665 (Fl.App. 1985), rev. denied, 480 So.2d 1294; State v. Harriman, 434 So.2d 551 (La.App. 1983); supervisory writ denied, 440 So.2d 551 (La. 1983), cert. denied, 106 S.Ct. 1958 (1986); State v. Dampier, 333 S.E.2d 230 (N.C. 1985)(notes but declines to follow Routhier); State v. Newton, 682 P.2d 295 (Utah 1984); McFadden v. Commonwealth, 300 S.E.2d 924 (Va. 1983); State v. Cornethan, 684 P.2d 1355 (Wash.App. 1984); cf. State v. Taylor, 643 P.2d 379, 382

(Or.App. 1981) (assumes without deciding that custodial conversations after invocation of the right to counsel may be permissible if concerned with matters unrelated to the one on which the right was invoked); People v. Warner, 146 Ill.App.3d 370, 496 N.E.2d 1010 (1986) (knowledge of invocation of right to counsel to F.B.I. during questioning will not be imputed to Chicago police who subsequently questioned defendant about same crime, so statements admissible despite Edwards). The Routhier/Robeıson approach not only extends the reach of Edwards beyond its original intendment, but in doing so conflicts with holdings from a substantial number of other jurisdictions. Such a conflict is one of the factors listed in Supreme Court Rule 17.1 as indicating that this Court should seriously consider granting certiorari.

B. This Court's on-going merger of Fifth and Sixth Amendment principles shows that Edwards should not be applied to bar police-initiated interrogation on a case concerning which the arrestee has not invoked counsel.

Assuming that the decisions in Edwards and its progenitor, Miranda v. Arizona, 384 U.S. 436 (1966), are indeed the foundation on which Routhier/Roberson rests, the question immediately arises whether or not that foundation has so shifted that the superstructure must collapse. Earlier Supreme Court cases, including Miranda and Edwards, attempted to maintain some distinction between a Fifth Amendment right to counsel at interrogation (which those cases protect), and a Sixth Amendment right to advice of counsel triggered by institution of the accusatory process, as in Massiah v. United States, 377 U.S. 201 (1964). However, even the Edwards court found support for its holding in Sixth Amendment decisions. (See 451 U.S. at 484, n. 8.) Whatever viability the Fifth Amendment/Sixth Amendment distinction may have previously possessed appears to have been wiped out in Michigan v. Jackson, ___ U.S. ____, 106 S.Ct. 1404 (1986). If a complete wall of separation between Fifth

and Sixth Amendment analysis really existed, Jackson could not have been decided as it was. The facts in Jackson revolved around a plain Sixth Amendment right to counsel after arraignment, but the argument for exclusion was based on Miranda and Edwards, which purport to rest on the Fifth Amendment. Nonetheless, and in the face of a vigorous dissent, this Court treated a request for counsel at arraignment as being identical in effect to a request for counsel during questioning under Edwards. This clearly indicates that Sixth Amendment cases have significance in applying Edwards.

This meshing of the two approaches is important to the present case, because of two other new Sixth Amendment decisions. In Maine v. Moulton, ___ U.S. ___, 106 S.Ct. 477 (1985), the question was admissibility of statements made to an informer. This Court held that statements about charges on which the defendant already had been indicted had to be excluded, because obtaining them violated the right to

counsel, but statements on new charges, where the right to counsel had not attached, were admissible:

> [To] exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, not withstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.[16]

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[16] Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.

(106 S.Ct. at 489-90; emphasis added.)

Thus, statements concerning different offenses were specifically held subject to differing treatment, even when developed simultaneously by one person in the course of a single investigation. A fortiori,

statements about different offenses, developed at different times, by different investigators, in the course of two wholly independent investigations, should not be treated the same. Inasmuch as there was no nexus whatever between the statements given in this case and the statements given in the case on which Roberson was originally arrested and interrogated, the statements offered in this case should be examined by themselves. Since there was no involuntariness or failure to comply with Miranda and Edwards in this investigation, the statements given should be entirely admissible. This is especially true because there was no knowing circumvention of Roberson's right to counsel; on the contrary the police followed Miranda to the letter and had no idea that the right to counsel had been invoked.

This conclusion is reinforced by Moran v. Burbine, ___ U.S. ____, 106 S.Ct. 1135 (1986), which held that a confession is admissible, even if the defendant's lawyer

is not permitted to contact the defendant, when the defendant makes an otherwise voluntary and intelligent rights waiver. Moran points out that society has a "compelling interest" in obtaining confessions from lawbreakers; that the existance of a lawyer-client relationship on one charge does not create a Sixth Amendment right to the presence of counsel during interrogation on a different charge, and that the Miranda guarantee of the presence of counsel is triggered only by a request. (106 S.Ct. at 1144, 1146, and 1147, n.4.) Roberson thus had no right to counsel already operative when the detectives approached him about the present case. To be protected he had to invoke the right, which he failed to do, so his statements are completely admissible.

No United States Supreme Court case has dealt with renewed interrogation about crimes unrelated to the one which was in focus when the defendant invoked his right to counsel. The one decision to examine

renewed questioning on an unrelated offense is Michigan v. Mosley, 423 U.S. 96 (1975), and there the resultant admissions were held to be admissible. However, because Mosley involved the right to silence rather than the right to counsel, many courts (including the Arizona Supreme Court, in Routhier) concluded that the procedures Mosley laid down do not apply to situations like the one here. Michigan v. Jackson, Maine v. Moulton and Moran v. Burbine have drawn Fifth and Sixth Amendment analyses close together, and plainly indicate that counsel rights attaching to a defendant on one charge do not bar questioning on unrelated charges, anymore than the right to silence invoked on the first charge barred questioning about the second unrelated charge in Mosley. The theoretical underpinning for Routhier having been dissolved by the subsequent decisions just discussed, it should be explicitly laid to rest -- that a lower court has decided an important issue of federal law which has not

yet been settled by this Court, or has decided a federal issue in a way which conflicts with applicable decisions of this Court, is yet another basis under Rule 17.1 for granting certiorari.

C. The Routhier/Roberson approach offends the rationale behind the exclusionary rule.

Time and time again this Court has pointed out that the purpose of an exclusionary rule is to deter police misconduct, so that there is no reason to exclude reliable evidence of guilt where the police have acted in good faith. See, e.g., Illinois v. Krull, ___ U.S. ___, 107 S.Ct. 1160 (1987); Colorado v. Connelly, ___ U.S. ____, 107 S.Ct. 515 (1986); United States v. Leon, 468 U.S.897 (1984); United States v. Peltier, 422 U.S. 531 (1975); Michigan v. Tucker, 417 U.S. 433 (1974). In situations where this goal of deterrence is not substantially advanced by an exclusionary rule (which exacts high social costs such as interference with the truth-finding function, release of guilty

defendants, and generation of disrespect for the judicial system) the rule is not applied. It is undisputed that the police who questioned Roberson in jail did everything they were supposed to do under Miranda and had no knowledge of the prior invocation of rights. To exclude a completely voluntary statement obtained under such circumstances in the interest of some "bright line" rule of application of Edwards is a travesty of justice. Former Chief Justice Berger wrote, concurring in the judgment in Michigan v. Jackson:

> I concurred only in the judgment in Edwards v. Arizona, 451 U.S. 477, 487-488, 101 S.Ct. 1880, 1886, 66 L.Ed.2d 378 (1981), and in doing so I observed that:
>
> > "The extraordinary protections afforded a person in custody suspected of criminal conduct are not without a valid basis, but as with all 'good' things they can be carried too far."
>
> The urge for "bright-line" rules readily applicable to a host of varying situations would likely relieve this Court somewhat from more than a doubling of the Court's work in recent decades, but this urge seems to be leading the Court to an absolutist, mechanical treatment of the subject.

At times, it seems, the judicial mind is in conflict with what behavioral -- and theologicial -- specialists have long recognized as a natural human urge of people to confess wrongdoing. See, e.g., T.Reik, The Compulsion to Confess (1959).

We must, of course, protect persons in custody from coercion, but step by step we have carried this concept well beyond sound, common-sense boundaries. The Court's treatment of this subject is an example of the infirmity of trying to perform the rulemaking function on a case-by-case basis, ignoring the reality that the criminal cases coming to this Court, far from typical, are the "hard" cases. This invokes the ancient axiom that hard cases can make bad law.

> Stare decisis calls for my following the rule of Edwards in this context, but plainly the subject calls for re-examination. Increasingly, to borrow from Justice Cardozo, more and more "criminal[s] ... go free because the constable has blundered."

(106 S.Ct. at 1411.) In the present case the "constable" did not even "blunder", but meticulously conformed to the dictates of the law, and yet the Routhier/Roberson "bright-line rule" would free Roberson from facing his fully-warned, wholly voluntary statements. Such "absolutist, mechanical treatment of the subject" surely "calls for

re-examination".

D. <u>The Routhier/Roberson approach is inconsistent with the "independent source" doctrine</u>.

Another serious objection to the meat-ax <u>Routhier/Roberson</u> approach is its total failure to take into account another relevant principle, the "independent source" doctrine. While the history of this exception to the exclusionary rule reaches back to the genesis of the exclusionary rule itself, this Court recently recapitulated the doctrine in an extremely clear manner, and pointed out its applicability to both Fifth and Sixth Amendment violations, in a decision which bears quoting at length:

> The doctrine requiring courts to suppress evidence as the tainted "fruit" of unlawful governmental conduct had its genesis in <u>Silverthorne Lumber Co. v. United States</u>, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); there, the Court held that the Exclusionary Rule applies not only to the illegally obtained evidence itself, but also to other incriminating evidence derived from the primary evidence. The holding of <u>Silverthorne</u> was carefully limited, however, for the Court emphasized that such information does not automatically become "sacred and

inaccessible." Id. at 392, 40 S.Ct. at 183.

> If knowledge of [such facts] is gained from an independent source, they may be proved like any others ...." Ibid. (emphasis added).

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), extended the Exclusionary Rule to evidence that was the indirect product or "fruit" of unlawful police conduct, but there again the Court emphasized that evidence that has been illegally obtained need not always be suppressed, stating:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Id., at 487-488, 83 S.Ct., at 417 (emphasis added) (quoting J. Maguire, Evidence of Guilt 221 (1959)).

The Court thus pointedly negated the kind of good-faith requirement advanced by the Court of Appeals in reversing the District Court.

Although Silverthorne and Wong Sun involved violations of the Fourth Amendment, the "fruit of the poisonous tree" doctrine has not been limited to cases in which there has been a Fourth

Amendment violation. The Court has applied the doctrine where the violations were of the Sixth Amendment, see United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), as well as of the Fifth Amendment.[3]

The core rationale consistently advanced by this Court for extending the Exclusionary Rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. This Court has accepted the argument that the way to ensure such protection is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.

By contrast, the derivative evidence analysis ensures that the prosecution is not put in a worse position simply because of some earlier police error or misconduct. The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation. That doctrine, although closely related to the inevitable discovery doctrine, does not apply here; Williams' statements to Leaming indeed led police to the child's body, but that is not the whole story. The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries

receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred. See Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 79, 84 S.Ct. 1594, 1609, 12 L.Ed.2d 678 (1964); Kastigar v. United States, 406 U.S. 441, 457, 458-459, 92 S.Ct. 1653, 1663-1664, 32 L.Ed.2d 212 (1972). When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

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3 In Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 79, 84 S.Ct. 1594, 1609, 12 L.Ed.2d 678 (1964), the Court held that a "state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." The Court added, however, that "[o]nce a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." Id., at 79, n. 18, 84 S.Ct., at 1609, n. 18; see id., at 103, 84 S.Ct., at 1616 (WHITE, J., concurring). Application of the independent source doctrine in the Fifth Amendment context was reaffirmed in Kastigar v. United States, 406 U.S.

441, 460-461, 92 S.Ct. 1653, 1664-1665, 32 L.Ed.2d 212 (1972).

Nix v. Williams, 467 U.S. 431, 441-44 (1984) (all emphasis in original).

To suppress evidence which has no relation whatever to a prior police illegality is to effectively put the police in a worse situation than if there had been no error, and that, according to Nix v. Williams, is unacceptable. Routhier/Roberson plainly violates this altogether logical rule. The "independent source" doctrine applies to statements (whether of witness or suspects), not just tangible evidence. United States v. Ceccolini, 435 U.S. 268 (1977), and cases discussed therein. The questioning done by Detective Coto-Robles on April 19 concerning the April 15 burglary is obviously something that happened altogether independently of the improper resumption of questioning which occurred after the invocation of rights on April 16. No logic can justify suppression of the voluntary statements elicited at that

time, so Routhier/Roberson should be reviewed and overruled.

E. The Routhier/Roberson rule is unreasonable.

Routhier seems to hold that, once an accused invokes his right to counsel, he can never again be questioned until he is provided with a lawyer, regardless of subject matter. This rigid rule leads to absurd results. Suppose a defendant is arrested for and interrogated about Crime A, questioning ends when he invokes his right to counsel, and he is released on his own recognizance without ever seeing a lawyer. When he is later picked up and interrogated about Crime B (which has no nexus whatever with Crime A) by officers who know nothing about the invocation of counsel and have no interest in Crime A, Routhier as it now stands bars admission of statements about B, even in a trial on Crime B alone. This is a patently ridiculous result, which has no reasonable basis even in the prophylactic approach of Miranda and Edwards v. Arizona. Except that Roberson remained in

jail, his case is exactly like this hypothetical.

The Court of Appeals suggested that this argument construes Routhier too broadly, and that Roberson's continuing in custody was significant, because "The coercive environment never dissipated". (Slip Opinion at 3.) To so reason is to exchange the unmitigated fiction of a hypothetically coercive atmosphere for reality. Roberson had retracted his original invocation of counsel within minutes of having made it. He then was left alone for 3 days before being reapproached and rewarned of his rights, which he freely waived. He was questioned about wholly unrelated offenses, so there was no "cat out of the bag" psychological pressure. There was no intimidation, coercion, or deception by the police -- no physical or psychological overreaching of any kind. See Part III - B of Colorado v. Connelly, supra, and Colorado v. Spring, __ U.S. ___, 107 S.Ct. 851 (1987). This is a far greater dissipation of connection than

occurred in Michigan v. Mosley, where the arrestee was reinterrogated within a few hours, and was falsely told that another defendant had implicated him, but the statements were held admissible. That Mosley involved invocation of the right to silence, while this case involved invocation of the right to counsel, is a distinction which makes absolutely no logical difference when the question of whether the arrestee's exercise of his right was scrupulously honored and effective; if the Mosley statements were properly admitted (and this Court held that they were), then Roberson's statements likewise are properly admissible, and this Court should so hold.

CONCLUSION

Earlier this year this Court admonished itself to decide a case involving alleged police interrogation after invocation of the right to counsel "remember[ing] the purpose behind our decisions in Miranda and Edwards: preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." Arizona v. Mauro, ___ U.S. ___, 107 S.Ct. 1931, 1936-37 (1987). The approach enunciated in Routhier and applied in this case is plainly at odds with that purpose, because it excludes even properly warned, wholly voluntary confessions, the giving of which had absolutely nothing to do with the environment. The Routhier/Roberson rule goes beyond Edwards, conflicts with numerous decisions from other jurisdictions, ignores the convergence of Fifth and Sixth Amendment analysis found in the recent decisions of this Court, offends the rationale behind the exclusionary rule, violates the independent

source doctrine, and cannot be squared with common sense. This Court should grant certiorari to eradicate this thoroughly bad approach to interrogation issues.

Respectfully submitted,

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THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	No. CR-16041
	)	
vs.	)	
	)	
RONALD ROBERSON,	)	
	)	
Defendant.	)	
	)	

APRIL 3, 1986

BEFORE THE HONORABLE

MICHAEL D. ALFRED

MOTION TO SUPPRESS

APPEARANCES:

PAUL LAURITZEN

For the Plaintiff

MICHAEL DRAKE

For the Defendant

JANET THOMAS
Official Court Reporter

APPENDIX 1

[PAGE 7]

JERRY COTA-ROBLES,

called as a witness on behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LAURITZEN:

Q On what date is all of this happening? The burglary is the 15th, when did you become aware of it, on the 15th or --

A I became aware of the burglary on the 15th and went out to Tucson Estates the 16th of April.

Q All right. After you left Tucson Estates, you came back to the Tucson Police Department?

A Yes, I did.

Q At some point did you engage in conversation about that car with any

other detectives?

A Yes.

Q What date was that?

A That was on the 18th of April.

[PAGE 8]

Q All right. Where were you when you had that conversation?

A I was on the third floor of the main police station.

Q Who was present for it?

A I was -- contact was made over the telephone.

Q You called --

A Yes, I did.

Q -- these --

A I called the major offenders' unit, which is on the first floor.

Q What was your purpose for calling them?

A I wanted them to help me, I had a suspect vehicle, and to let them know, be aware I'm watching out for

it in case they had any burglaries, to report it to the major offenders' unit. It's a burglary unit, people that go out and do undercover work for us.

Q Who do you remember works out at major offenders; do you remember?

A Barbara Wright.

Q When you gave her that suspect vehicle information, what -- did she respond in any way indicating that she recognized that or not?

A Yes.

[PAGE 9]

Q What did she tell you?

A She told me that a subject had been arrested in that vehicle for doing a burglary on the east side.

Q And did she give you his name?

A Yes, she did.

Q What other information, if any, did she give you about him?

A She gave me his name and told me who was handling the case on the east side.

Q And who was that?

A Detective Quinn and Detective Thorson.

Q Did you contact either of them?

A Yes, I did.

Q When?

A That same day right after I got off the phone with Barbara Wright.

Q And was that on the phone or in person?

A On the phone.

Q And what was the nature of your contact with them?

A I advised them that I had had a burglary involving that vehicle, and they advised me that he had been arrested doing a burglary on the east side, Mr. Roberson.

[PAGE 10]

Q What happened then?

to the charge on which the person invoked his rights, purports to be nothing more than an application of Edwards v. Arizona, 451 U.S. 477 (1981). However, Routhier plainly goes far beyond Edwards. Edwards involved a reinterrogation about the same crime as to which the defendant had invoked counsel; to extend it to preclude questioning about wholly unrelated offenses is to take it beyond both its logic and its facts. In the past this Court has cautioned against expanding "currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries...." Lego v. Twomey, 404 U.S. 477, 488-89 (1972). That, however, is precisely what the Routhier/Roberson rule does -- expand the Edwards exclusionary rule into an area not clearly contemplated by that decision.

Judge Learned Hand warned that, "The suppression of truth is a grievous necessity at best, more especially when as here its inquiry concerns the public interest; it can

be justified at all only when the opposed private interest is supreme." McMann v. Securities and Exchange Commission, 87 F.2d 377, 378 (2d Cir. 1937), cert. denied, 301 U.S. 684. That there is such a "supreme" interest in precluding voluntary confessions because of an invocation of rights in a wholly separate investigation is far from self-evident. Indeed, the appellate courts in a number of jurisdictions have concluded (many of them post-Routhier) that Edwards does not bar questioning about unrelated offenses. See Lofton v. State, 471 So.2d 665 (Fl.App. 1985), rev. denied, 480 So.2d 1294; State v. Harriman, 434 So.2d 551 (La.App. 1983); supervisory writ denied, 440 So.2d 551 (La. 1983), cert. denied, 106 S.Ct. 1958 (1986); State v. Dampier, 333 S.E.2d 230 (N.C. 1985)(notes but declines to follow Routhier); State v. Newton, 682 P.2d 295 (Utah 1984); McFadden v. Commonwealth, 300 S.E.2d 924 (Va. 1983); State v. Cornethan, 684 P.2d 1355 (Wash.App. 1984); cf. State v. Taylor, 643 P.2d 379, 382

(Or.App. 1981) (assumes without deciding that custodial conversations after invocation of the right to counsel may be permissible if concerned with matters unrelated to the one on which the right was invoked); People v. Warner, 146 Ill.App.3d 370, 496 N.E.2d 1010 (1986) (knowledge of invocation of right to counsel to F.B.I. during questioning will not be imputed to Chicago police who subsequently questioned defendant about same crime, so statements admissible despite Edwards). The Routhier/Roberson approach not only extends the reach of Edwards beyond its original intendment, but in doing so conflicts with holdings from a substantial number of other jurisdictions. Such a conflict is one of the factors listed in Supreme Court Rule 17.1 as indicating that this Court should seriously consider granting certiorari.

B. This Court's on-going merger of Fifth and Sixth Amendment principles shows that Edwards should not be applied to bar police-initiated interrogation on a case concerning which the arrestee has not invoked counsel.

Assuming that the decisions in Edwards and its progenitor, Miranda v. Arizona, 384 U.S. 436 (1966), are indeed the foundation on which Routhier/Roberson rests, the question immediately arises whether or not that foundation has so shifted that the superstructure must collapse. Earlier Supreme Court cases, including Miranda and Edwards, attempted to maintain some distinction between a Fifth Amendment right to counsel at interrogation (which those cases protect), and a Sixth Amendment right to advice of counsel triggered by institution of the accusatory process, as in Massiah v. United States, 377 U.S. 201 (1964). However, even the Edwards court found support for its holding in Sixth Amendment decisions. (See 451 U.S. at 484, n. 8.) Whatever viability the Fifth Amendment/Sixth Amendment distinction may have previously possessed appears to have been wiped out in Michigan v. Jackson, ___ U.S. ____, 106 S.Ct. 1404 (1986). If a complete wall of separation between Fifth

and Sixth Amendment analysis really existed, Jackson could not have been decided as it was. The facts in Jackson revolved around a plain Sixth Amendment right to counsel after arraignment, but the argument for exclusion was based on Miranda and Edwards, which purport to rest on the Fifth Amendment. Nonetheless, and in the face of a vigorous dissent, this Court treated a request for counsel at arraignment as being identical in effect to a request for counsel during questioning under Edwards. This clearly indicates that Sixth Amendment cases have significance in applying Edwards.

This meshing of the two approaches is important to the present case, because of two other new Sixth Amendment decisions. In Maine v. Moulton, ___ U.S. ____, 106 S.Ct. 477 (1985), the question was admissibility of statements made to an informer. This Court held that statements about charges on which the defendant already had been indicted had to be excluded, because obtaining them violated the right to

counsel, but statements on new charges, where the right to counsel had not attached, were admissible:

> [To] exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, not withstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.[16]

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16 Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.

(106 S.Ct. at 489-90; emphasis added.)

Thus, statements concerning different offenses were specifically held subject to differing treatment, even when developed simultaneously by one person in the course of a single investigation. A fortiori,

statements about different offenses, developed at different times, by different investigators, in the course of two wholly independent investigations, should not be treated the same. Inasmuch as there was no nexus whatever between the statements given in this case and the statements given in the case on which Roberson was originally arrested and interrogated, the statements offered in this case should be examined by themselves. Since there was no involuntariness or failure to comply with Miranda and Edwards in this investigation, the statements given should be entirely admissible. This is especially true because there was no knowing circumvention of Roberson's right to counsel; on the contrary the police followed Miranda to the letter and had no idea that the right to counsel had been invoked.

This conclusion is reinforced by Moran v. Burbine, ___ U.S. ____, 106 S.Ct. 1135 (1986), which held that a confession is admissible, even if the defendant's lawyer

[PAGE 27]

After that he was interrogated by Officer Garrison, and after that apparently by Officer Quinn, yet on April 16th. And then on April 19th he was interrogated by Officer Cota-Robles and made the incriminating statement that we are requesting be suppressed.

[PAGE 43]

AFTER THE RECESS:

THE COURT: Back for the record on CR-16041, State versus Roberson.

For the record show the presence of both counsel and the defendant.

As to the defendant's motion to suppress, the Court has read and considered the memorandum, both memorandum of counsel. And the testimony has been [PAGE 44] taken. I also listened to the tape, and did some

research on my own, and I'm going to make a little bit of a speech here so that in the event there is an appeal, there'll be no problems and everybody knows what to appeal from.

The Court's found that the Arizona case law has held that once an accused has invoked his right to counsel, he may not be interrogated concerning that incident or matters inextricably related to that incident pursuant to the holding in State versus Hensley, Arizona 137-80.

The holding in Hensley was, that continuing to question the defendant on subjects related to the subject for which the accused requested the counsel is inconsistent with the holding in Miranda versus Arizona.

State versus Routhier,

R-o-u-t-h--i-e-r, Arizona 137-90, takes State versus Hensley one step further. And in that, in Routhier the question is whether the defendant's Fifth and Fourteenth Amendment rights were violated when the defendant was interrogated concerning unrelated matters after asserting his right to counsel on another matter.

Routhier was based on Edwards versus Arizona which held that once the defendant has invoked his right to counsel, he may not be re-interrogated [PAGE 45] unless counsel has been made available to him or he initiates the conversation.

The Routhier court states that whether the defendant is re-interrogated about the same offense or an unrelated offense makes no difference for Fifth Amendment

purposes.

The Routhier court further stated that Edwards is clear and unequivocal, there is to be no further interrogation by authorities once the right to counsel is invoked. The Court in that case finding that the assertion of the right to counsel is an assertion by the accused that he is not competent to deal with authorities without legal advice. And that the resumption of questioning by the police without the requested attorney being provided, strongly suggests to the accused that he has no choice but to answer.

State versus Clabourne at 142 Arizona 335 is not found to be of much assistance here, since the defendant in that case never invoked his right to counsel to the police officers.

On appeal he claimed that since he was represented by counsel on another matter, the waiver of that right on the instant matter was invalid.

In this case the Court finds that the only permissible interrogation of the defendant after he had [PAGE 46] invoked his right to counsel - in this case I mean in State versus Roberson, CR-16041 - Court finds that the only permissible interrogation of the defendant Roberson after he had invoked his right to counsel would be where he had initiated the conversation, which is not the case here.

The Court thus grants the defendant's motion to suppress the statements obtained by Detective Cota-Robles.

However -- I'm not done yet. However,

the Court has heard sufficient evidence to conclude that the trustworthiness of the evidence, that is the statement, satisfies legal standards and will, pursuant to State versus Swinburne at 116 Arizona 402, allow the statement to be used for impeachment purposes with a limiting instruction to the jury concerning the use by them of such a statement.

[PAGE 50]

MR. LAURITZEN: The other thing that I guess I would like to make clear is a finding of fact. That there is virtually no nexus, or I guess I might ask for the Court to make a finding of the fact that what, if any, nexus there was between Detective Cota-Robles' interview of the defendant, which the Court is suppressing, and the earlier invocation of rights, or any fruit therefrom, or violation of right, if you

will, or fruit therefrom.

It's the State's position that what actually happened in this case, or via inevitable discovery, that detective Cota-Robles eventually was or would have been led to Mr. Roberson, had there been an April 16th case or not.

And I think that is of some significance here.

THE COURT: Well, nobody is questioning Detective Cota-Robles' motives or his methods. You know, what he has done, there's nothing wrong with what he has done except for the fact that the man had invoked his right to counsel earlier.

MR. DRAKE: All right, is the Court specifically finding that the April 19th interrogation [PAGE 51] by Detective Cota-Robles was in no way a fruit of the April 16th violation, other than it

followed it in time?

THE COURT: Yes.

MR. LAURTIZEN: So it was not a fruit?

THE COURT: No, I find that it was not.

[PAGE 52]

MR. DRAKE: Your Honor, I have spoken with Mr. Roberson in the hallway about this matter, and we would stipulate to this but only this: That if these other officers, mentioned by Mr. Lauritzen, were called to testify, that they would testify that they were not aware that he had expressly requested presence of counsel on April 16th, 1985.

FILED BY CLERK
MAR. 19, 1987
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

THE STATE OF ARIZONA, Appellant, vs. RONALD WILLIAM ROBERSON, Appellee.	)	NO. 2 CA-CR 4474-5 Department A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-16041

Honorable Michael D. Alfred,
Judge Pro Tempore

AFFIRMED

Robert K. Corbin, The Attorney General
by Bruce M. Ferg — Tucson

Attorneys for Appellant

Robert L. Barrasso — Tucson

Attorney for Appellee

HATHAWAY, Chief Judge.

A detective (Cota-Robles) investigating an April 15, 1986, burglary discovered that the suspect, appellee, was already in custody, charged with an April 16, 1986 burglary. In response to the April 16 arrest, appellee had invoked his Fifth Amendment right to counsel. On April 19, 1986, when Cota-Robles advised appellee of his Miranda rights, appellee had neither been provided counsel nor released from custody since his April 16 arrest. Appellee did not reassert his request for counsel; instead, he inculpated himself as to the April 15 burglary. At trial, the court relied on State v. Routhier, 137 Ariz. 90, 669 P.2d 68 (1983), and granted appellee's motion to suppress the April 19th statements.[1/] The state now appeals, requesting that we either rule Routhier is no

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1/ The Routhier court held that "after requesting counsel during the initial interrogation, the [accused] should not have been subjected three days later to interrogation which he did not initiate, without counsel having been made available to him." 137 Ariz. at 98, 669 P.2d at 76.

longer viable authority or ask that the Arizona Supreme Court overrule or limit their decision.

The Court of Appeals is not empowered to overrule a decision of the Arizona Supreme Court. State v. Korte, 115 Ariz. 517, 566 P.2d 318 (App. 1977). We do agree with appellant that we are not bound to follow Arizona Supreme Court decisions if "recent interpretations of the United States Constitution by the United States Supreme Court have rendered the position of the Arizona Supreme Court untenable." State v. Casey, 10 Ariz.App. 516, 517, 460 P.2d 52, 53 (1969). However, no recent United States Supreme Court decision has addressed the Fifth Amendment issue presented by Routhier. The two decisions appellant cites us to are easily distinguishable. Maine v. Moulton, ___ U.S. ____, 106 S.Ct. 477, 88 L.Ed. 481 (1986); Moran v. Burbine, ___ U.S. ____, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

As for appellant's request that we catalogue Routhier's flaws for the Arizona Supreme Court's convenience, we respond that appellant construes the decision too broadly. Contrary to appellant's characterization, Routhier does not hold that "once an accused invokes his right to counsel, he can never again be questioned until he is provided with a lawyer." In Routhier, as in the instant case, the accused was continuously in police custody from the time of asserting his Fifth Amendment right through the time of the impermissible questioning. The coercive environment never dissipated.

We affirm.

/s/ James D. Hathaway
JAMES D. HATHAWAY, Chief Judge

CONCURRING:

/s/ Lawrence Howard
LAWRENCE HOWARD, Presiding Judge

/s/ Lloyd Fernandez
LLOYD FERNANDEZ, Judge

SUPREME COURT

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July 1, 1987

RE: STATE OF ARIZONA vs. RONALD WILLIAM ROBERSON
Supreme Court No. CR-87-0110-PR
Court of Appeals No. 2 CA-CR 4474-5
Pima County No. CR-16041

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 30, 1987, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to the Court of Appeals, Division Two, Tucson, this 1st day of July, 1987.

DAVID R. COLE, Clerk

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